IN THE COURT OF APPEALS OF THE STATE OF ALASKA

PATRICK DALE BURTON-HILL, Appellant, vs. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13223 Trial Court No. 4FA-18-00521CR
JERALD DWAYNE BURTON, Appellant, vs. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13262 Trial Court No. 4FA-18-00520CR
MARCUS DJAUN HOWARD, Appellant, vs. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13263 Trial Court No. 4FA-18-00525CR

Department of Law, Criminal Division
Office of Criminal Appeals
1031 W. 4th Avenue, Ste 200
Anchorage, AK 99501
Phone: (907) 269-6260 Fax: (907) 276-3697
Email: ocapleadings@alaska.gov

MOTION TO RECONSIDER ORDER FOR SUPPLEMENTAL BRIEFING

VRA CERTIFICATION. I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

Patrick Burton-Hill, Jerald Burton, Marcus Howard, and Robert Gentleman were tried together for their parts in a riot for which 13 inmates

were indicted. Burton-Hill, Burton, and Howard separately appealed their convictions, and the briefing is complete. Gentleman is still awaiting sentencing. *See* Case No. 4FA-18-00523CR.

This Court stated that the defendants in the three cases before the Court have raised "several issues that hinge, either directly or implicitly, on the definition of the offense of riot as codified in AS 11.61.100(a)." Order, *Burton-Hill v. State*, No. A-13223, *Burton v. State*, No. A-13262, *Howard v. State*, No. A-13263 (Sept. 1, 2021). This Court ordered formal supplemental briefs on four questions.

The State moves for reconsideration of the Court's order.

I. THIS COURT'S ORDER UNDERMINES THE ADVERSARY SYSTEM.

The United States Supreme Court has repeatedly reminded lower courts and judges that "[i]n our adversarial system of adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020). This adversarial system "rel[ies] on the parties to frame the issues for decision and assign[s] to courts the role of neutral arbiter of matters the parties present." *Id.* (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)); *see also State v. Ranstead*, 421 P.3d 15, 21 (Alaska 2018) (quoting *Greenlaw*). "[O]ur system is designed around the premise that parties represented by competent counsel know what is best for them, and are

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responsible for advancing the facts and argument entitling them to relief." *Id.* (internal alterations omitted) (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J. concurring) (citing Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 Buffalo L. Rev. 409, 431-32 (1960) (contrasting the American system with the German system, which "puts its trust in a judge of paternalistic bent acting in cooperation with counsel of somewhat muted adversary zeal"))).

"In short: Courts are essentially passive instruments of government. They do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties." *Sineneng-Smith*, 140 S.Ct. at 1579 (internal alterations omitted) (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh'g en banc)).

Alaska courts have adopted the same principle. Parties must raise an objection in the trial court to preserve arguments for appeal and must obtain a ruling from the trial court. *See, e.g., Ranstead*, 421 P.3d at 20; *Hollstein v. State,* 175 P.3d 1288, 1290 (Alaska App. 2008) (to raise an issue on appeal, litigant must show not only that he presented the issue to the lower court, but also that the lower court ruled on the issue). "No procedural principle is more familiar than that a right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having

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jurisdiction to determine it." *Ranstead*, 421 P.3d at 20 (internal alterations omitted) (quoting *United States v. Olano*, 507 U.S. 725, 731 (1993)). This principle applies on appeal as well as in the trial courts:

> [W]here a point is specified as error in a brief on appeal, thus raising such point as one to be relied upon, but such point is not given more than cursory statement in the argument portion of the brief, such point will not be considered by the Supreme Court. Failure to argue a point constitutes abandonment of it.

Lewis v. State, 469 P.2d 689, 691 n.2 (Alaska 1970) (citation omitted). Thus, a party abandons a point by failing to include it in his opening brief. And even if a point is raised, it should not be considered if it was not properly briefed. Applying settled law, Alaska's appellate courts act correctly when they decline to consider arguments that have not been preserved or were inadequately briefed.

Departures from these principles generally occur only to protect a *pro se* litigant's rights. *Sineneng-Smith*, 140 S.Ct. at 157. But even a *pro se* litigant "must cite authority and provide a legal theory," and his brief must allow his opponent to discern his legal argument. *Wright v. Anding*, 390 P.3d 1162, 1169 (Alaska 2017). A "modest" relaxation of these principles may be appropriate to correct a party's miscalculation, address an issue of standing, consider intervening circumstances, or clarify an argument that was actually raised. *Sineneng-Smith*, 140 S.Ct. at 1579, 1582 (citations omitted). "In rare instances," a court may order briefing on a constitutional issue that is

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"implicated, but not directly presented," by a question that has been raised, *as long as* the issue was raised in the lower courts. *Id*. at 1582 (citations omitted).

These principles weigh against the order for supplemental briefing in these cases. Each defendant is represented by counsel who made tactical decisions in the trial court and on appeal regarding which claims to pursue and how to brief them. The co-defendants presented a variety of different claims and focused on different issues. The State responded to the claims that were briefed in each case, and this Court should not reach issues that were not preserved in the trial court or properly presented in their briefing on appeal.

Moreover, the State did not merely respond to the defendants' arguments on the merits. The State also argued that certain claims were not preserved, or were expressly waived in the trial court. The State argued that some claims were inadequately briefed on appeal. Inadequate briefing is not correctable in a reply brief. *Windel v. Carnahan*, 379 P.3d 971, 980 (Alaska 2016). The order in which an issue is briefed "potentially prejudice[s] the State," because an appellee "is entitled to know what legal and factual arguments the appellant is relying on." *Berezyuk v. State*, 282 P.3d 386, 400 (Alaska App. 2012). If an appellant does not adequately brief an issue—or does not raise an issue at all in the trial or appellate court—the appellate court must reject that argument. It should not *sua sponte* scour the record and applicable statutes for potential arguments to make and legal theories to

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present. It is fundamentally unfair to an appellee for an appellate court to raise issues on behalf of an appellant, or to order supplemental briefing when the appellee has structured its argument on the issues that were raised and the extent to which those issues were raised.

If the co-defendants' claims hinge on Alaska's definition of riot, either "directly" or "implicitly," it was incumbent on them to fully brief these issues and support their argument in the trial court and on appeal. If a party did not do so, the proper consequence is to find those issues waived or abandoned, not to grant a "do over" for a party to revisist their trial and appellate litigation choices and strategy. *Sineneng-Smith*, 140 S.Ct. at 1578. On the other hand, if these issues were properly raised, then there is no need for supplemental briefing.

In sum, it is improper for a court to "issue spot" and inject additional issues into a case. By suggesting new potential grounds for reversal, supplemental briefing can only benefit an appellant and prejudice an appellee. *See Berezyuk*, 282 P.3d at 400 (finding claim waived even though the appellee briefed it in an abundance of caution, and the appellant included it in the reply brief). The co-defendants chose to litigate these cases in a certain manner. This Court must decide the issues as presented.

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III. SUPPLEMENTAL BRIEFING IS NOT WARRANTED AND ADDS TO APPELLATE DELAY.

There are practical as well as legal reasons why this Court should reconsider its order. Appellate delay has been a significant problem in Alaska for years. Attorneys routinely take more than a year to file an opening brief in a criminal case, and months to file an appellee's brief. *See* Standing Order No. 12. This Court has a significant backlog of cases that have been ripe for decision for months or years. These cases have been ripe for decision for months, and supplemental briefing can only further delay their resolution. Even if the parties meet the briefing deadlines in the order and do not need extensions, the resolution of these cases will be delayed at least another two months. The parties have already expended significant time and resources on this case. (Together, the co-defendants' briefs total more than 150 numbered pages, and the State's briefs total nearly 130.) Supplemental briefing on the four issues this Court identified would require significant additional time and resources and would unnecessarily delay the resolution of these and other cases.

Supplemental briefing should be reserved for cases in which there has been a change in factual or legal circumstances. Neither is present here. This Court should resolve the cases and not needlessly cause further delay with supplemental briefing.

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IV. THIS COURT'S ORDER MAY IMPROPERLY INFLUENCE ROBERT GENTLEMAN'S APPEAL.

Three of the four co-defendants who were tried together have already filed their appellate briefs, but Gentleman has not. Once Gentleman is sentenced, he will have the option to appeal his convictions. Whatever issues Gentleman might otherwise have pursued on appeal—adopting his co-defendants' claims or raising new claims—this Court has already tipped its hand as to the issues it believes all of the co-defendants could or should have raised, and has provided a roadmap for Gentleman to follow.

Appellate courts certainly may issue final decisions that will affect ongoing litigation in other cases. But Gentleman was tried together with Burton-Hill, Burton, and Howard. The record is essentially the same for each co-defendant, and the issues in this Court's order apply equally to all four co-defendants. This Court no doubt would have included Gentleman in its order if Gentleman's briefing had been complete. Under these unique circumstances, this Court's order may improperly influence Gentleman's appeal.

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VI. CONCLUSION

For these reasons, this Court should withdraw its order for supplemental briefing and promptly decide the issues that have been raised and briefed by the appellants.

DATED September 7, 2021.

TREG R. TAYLOR
ATTORNEY GENERAL

By: _____
Donald Soderstrom (1205046)
Assistant Attorney General

By: _____
Eric Ringsmuth (0305019)
Assistant Attorney General

By: _____
Tamara DeLucia (9906015)
Solicitor General

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CERTIFICATE OF SERVICE AND TYPEFACE

I, Sylva M. Ferry, state that I am employed by the Alaska Department of Law, Office of Criminal Appeals, and that on September 7, 2021, I emailed a copy of the State's MOTION TO RECONSIDER ORDER FOR SUPPLEMENTAL BRIEFING and this CERTIFICATE OF SERVICE AND TYPEFACE in the above-titled case to:

Elizabeth D. Friedman
friedmanlaw@mtaonline.net

Marilyn J. Kamm
marilynkamm@yahoo.com

Margot O. Knuth
margot.knuth@gmail.com

Michael L. Horowitz
mike@mlhorowitz.com

I further certify, pursuant to App. R. 513.5, that the font used in the aforementioned documents is Century Schoolbook 13 point.

Sylva M. Ferry

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